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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-1306

EDWARD G. CASTRO,
Petitioner,

vs.

PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

BRIEF IN OPPOSITION
to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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REASONS FOR DENYING THE WRIT

THE DECISION OF THE NINTH CIRCUIT IN THIS CASE CORRECTLY APPLIED THE HARMLESS ERROR RULE ANNOUNCED BY THIS COURT IN CHAPMAN V. CALIFORNIA

Although it is a constitutional error for a trial judge to instruct the jury that adverse inferences can be drawn from the defendant's silence, that error is not reversible if it can be determined that the error was harmless beyond

a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). Obviously, that determination must be made on a case-by-case basis. In *Fontaine v. California*, 390 U.S. 593 (1968) the state failed to meet this test.

> "The jury had been asked to convict petitioner on the basis of circumstantial evidence, in the absence of testimony from the State's agent who allegedly made purchases from petitioner. *In these circumstances*, the State has not met its burden of proving beyond a reasonable doubt that the erroneous comments and instruction did not contribute to petitioner's conviction."[1]

Fontaine is not this case. Here, during his instructions to the jury the trial judge said

> "Now in deciding whether or not to testify, the defendant may choose to rely on the state of the evidence, and upon the failure, if any, of the People to prove every essential element of the crime charged against him, and a lack of testimony on the defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such element.
>
> Remember that the law does not compel a defendant in a criminalcase [sic] to take the witness stand and testify; and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify; and as stated before by me, that the law never imposes upon the defendant

[1]*Fontaine v. California*, 390 U.S. 593, 595 (1968) [emphasis added].

> the duty of calling any witnesses or producing any evidence on his behalf."[2]

Earlier in his instructions the judge had told the jury

> "Now the law presumes this defendant, as in every criminal case, to be innocent; that is, he starts of [sic] the trial with a clean slate; that is, with no evidence against him; and the law permits nothing but legal evidence presented before you as jurors to be considered in support of any charges. So the presumption of innocence alone is sufficient to acquit a defendant unless you, as jurors, are satisfied beyond a reasonable doubt of the defendant's guilt after and careful impartial consideration of all the evidence in this case."[3]

Additionally, the jury had previously been told that

> "The burden is always upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt. This burden never shifts from the prosecution to the defendant; forthe [sic] law never imposes upon the defendant duty for calling any witnesses or producing any evidence in his behalf."[4]

At the close of the jury instructions, the petitioner's attorneys and the prosecutor were called to side bar to

[2]Trial transcript at 193-194. Note that the first paragraph was obviously taken from § 261 of CALJIC:

> "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the crime charged against him, and *no* lack of testimony on the defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such element. [emphasis added].

[3]Trial transcript at 188.

[4]Trial transcript at 189.

note objections to the jury charge. Although all three of them had objections to register,[5] no objection was made to the instructions petitioner now assigns as error. While one may hypothesize that the lack of an objection might

[5]"The Court: During a discussion in chambers with both attorneys present, and the government attorney was present, defense counsel stated to the Court that they did not wish the Court to give the less included offense as to charge No. 2; is that correct?

Mr. Terlaje: That is correct, Your Honor.

The Court: Very well. Does the government have any objection as to the instructions given by the Court?

Mr. Vance: Yes, Your Honor, one objection. The defendant is charged jointly on the possession with intent to deliver charge. The Court read exclusive possession to the jury; that they must find the defendant had exclusive possession.

The Court: What was that again? I'm sorry.

Mr. Vance: On the Court's instructions to the jury—

The Court: —on possession?

Mr. Vance: Right.

The Court: Is there an instruction on—

Mr. Vance: He is charged jointly and the Court read exclusive possession; that the government must prove; the government need not prove it is possession as to him. It is charged jointly and that is the evidence.

Mr. Arriola: Your Honor, as a result of Monday's trial—

The Court: I think the Government may be right. There was a portion I may have left out at the end of the possession. You are saying that there was joint possession?

Mr. Vance: Yes, Your Honor.

The Court: I didn't read the latter portion. Is this what you are referring to, the latter portion?

Mr. Vance: Yes, Your Honor.

The Court: You have some objections?

Mr. Arriola: Our objection is this: during our meeting with the—conference with the Judge, I was restricted from confronting the witness about Ninete. Counsel for the government mentioned Ninete's present [sic] there and I was prohibited, and I took the word of the judge in there and I refrained from it.

The Court: It will be noted on the record.

Mr. Terlaje: On our requested jury instruction No. 24, the Court denied our request. We will take exception to that.

The Court: Very well.

(End of side bar conference.)"

Trial transcript at 201-202.

reflect inattention on the part of defense counsel, the content of the discussion at side bar makes that possibility unlikely.

There are only two explanations for the appearance in this record of the above-mentioned misquote of Section 2.61 of CALJIC. Either the court reporter erred, or the judge misread the instruction.

Both the District Court opinion and the Ninth Circuit opinion assumed that the transcript properly reflected what the judge said, but that the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

That determination was correct. This record does not show, nor does it provide any reason to infer, that the instruction had an effect upon the jury's verdict. First, the statement of the judge is in conflict with not only the law, but also with the layman's concept of the government's burden of proof. While many pronouncements of a judge might be received by a jury with unquestioned acceptance, this statement is not among them. After all, as noted by petitioner "[a]ccording to this the government need not offer even a scintilla of evidence but can rely completely on a defendant's silence to establish guilt beyond a reasonable doubt!"[6]

Secondly, it is impossible to reconcile the statement now assigned as error with the paragraph that followed in the instructions. It is not possible to think that a jury would apply the erroneous language to the exclusion of the rest

[6]Petitioner's brief at 9.

of the charge, and never ask for clarifying instructions. This argument is particularly cogent in a case where the jury did ask for instructions on other matters.[7]

There is a third reason why it can be said that the jury did not rely on the erroneous part of the instruction. It acquitted Castro of the first charge. It is not reasonable to think that a jury who believed that "a lack of testimony on the defendant's part will . . . support by itself a finding against him" would acquit the defendant on one charge while convicting him on the other.

CONCLUSION

Petitioner argues that it was improper to apply the *Chapman* harmless error rule to the jury instructions in this case. However, an examination of the record shows that the error (if it existed at all) was undoubtedly harmless. The petition should be denied.

Respectfully submitted this 7th day of March, 1980.

Respectfully submitted,

KENNETH E. NORTH
Attorney General
Attorney for Respondent

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[7] "(1) We, the jury, in the above entitled action, request the following: the quoted definition of domain, possession, intent, knowledge, direct and indirect circumstantial evidence; (2) will a verdict have to be reached before the jury leaves the courthouse; (3) dictionary." Trial transcript at 203.